IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 777 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE KSHITIJ R.VYAS
and
Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgement? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

AKHAMBHAI AMARSINH PATEL

Versus

STATE OF GUJ.

Appearance:

1. Criminal Appeal No. 777 of 1993

MR KJ SHETHNA for appellant

MR KC SHAH, ld.ADDL.PUBLIC PROSECUTOR for Respondent

CORAM : MR.JUSTICE KSHITIJ R.VYAS
and
MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 20/02/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE KSHITIJ R.VYAS)

The appellant Akhambhai Amarsinh Patel who is the uncle of deceased Parvatsinh is convicted by the learned Addl. Sessions Judge, Panchmahal, Godhra, by judgment and order dated 28th May 1993 in Sessions Case No. 80 of 1992, has filed this appeal challenging the said judgment and order of conviction and sentence. Under the said judgment, the learned trial Judge has convicted him for the offence punishable under Section 302 of IPC and was sentenced to suffer rigorous imprisonment for life and a fine of Rs.500/- in default to undergo further imprisonment for one year. The appellant is also convicted for the offence punishable under Section 307 of IPC and was sentenced to suffer rigorous imprisonment for five years and the learned trial Judge has ordered to run both the sentences consecutively.

2. The prosecution case in nutshell can be stated as under:

Lilaben, PW5-Exh.13, the complainant is the mother of the deceased Parvatsinh and the wife of brother of the appellant. The appellant, at the relevant time, was serving as a Beat Guard in the Forest Department. The houses of the complainant and the appellant and another brother of the appellant, namely, Somsinh, are in the vicinity of each other. About ten days before the day of the incident, from the house of the appellant, Chhada of silver (an ornament) was stolen and the appellant and his wife were quarrelling. On 20th December 1991, the appellant went to the house of the complainant in an agitated mood. In the house of the complainant, besides her, there were other guests, i.e. her sister, namely, Rukhi, and her husband who had come from village Kasanpur. The appellant told her that the "Badva" (expert in black magic art) had disclosed him her name as well as the name of her son that they had stolen his Chhada. He started exchanging words and quarrelled with the complainant and told the complainant that he was going to Baria for bringing the gun to finish the whole family if the Chhada is not given back to him. After so saying, he went to Baria. In the meantime, deceased Parvat had gone to see off his aunt and uncle at Kevadia Patia and returned at 5.00 p.m. The appellant also returned from Baria at about 5.00 p.m. with the gun. The other brother of the deceased, namely Jashwant, PW8-Exh.18 also returned from the school was there in the house. It is the case of the prosecution that the complainant narrated the fact of the incident which happened in the afternoon to him. At about 6.00 p.m., on

hearing the sound, the complainant, Jashwant, Laxman, PW6-Exh.14, and his wife Dadamben saw the appellant came out with a gun and fired a shot at the deceased from the double barrel gun. By one shot, injury was caused on the person of the deceased who began to bleed. The appellant turned the point of the gun in the direction in which the complainant, and her son Jashwant were there. The complainant and her son Jashwant sat down behind the wall and then ran away from there to save their life. The appellant also fired a shot at them. The complainant and her son thereafter went to the house of Raghabhai Mansukhbhai Vanzara, PW10-Exh.22-Sarpanch of the village. The Sarpanch followed them to their residence. They found the deceased dead. The complainant and her son Jashwant thereafter went to Morwa Police Station with Sarpanch Raghabhai where the PSI Raisingbhai Parmar, PW15-Exh.38 recorded the FIR at Exh.39.

3. After completion of the investigation, the chargesheet was filed in the Court of learned JMFC, Godhra, and the case was committed it to the Court of Sessions. The charge Exh.2 was framed against the appellant under Sections 302 and 307 of IPC.

The appellant pleaded not guilty to the charge and claimed to be tried. The defence of the appellant was of total denial. The learned trial Judge, after appreciating the evidence on record, accepted the prosecution case and convicted the appellant as stated earlier.

4. Heard Mr.K.J.Shethna, learned Counsel appearing for the appellant and Mr.K.C.Shah, learned Addl.PP appearing for the respondent-State, at length.

5. Dr.Rajendrakumar Joshi, PW1-Exh.7 who has performed the Post Mortem of the deceased at the relevant time was serving as Medical Officer at the Primary Health Centre, Kevadia. He has deposed in his evidence that he received the dead body of the deceased in the morning of 21st December 1991. He started the post mortem at 9.40 a.m. and found five external injuries on the front as well as back portion of the body of the deceased. The details of the injuries are given in Column 17 of the Post Mortem Report. According to him, external injury nos. 4 and 5 are on the front portion of injury nos.1 and 2 and they are corresponding to each other and that all these injuries are ante-mortem. According to Dr.Joshi, the cause of the death was shock due to internal hemorrhage due to fire arm. In his cross examination, Dr.Joshi has stated that he has no knowledge

regarding the fire arm because it is not his subject.

Mohanbhai Jivabhai, PW13-Exh.30, Senior Scientific Assistant, FSL, Ahmedabad is examined in the instant case. According to him, he has examined the muddamal gun and the same is a double barrel gun with 12 bore, which is in working condition. According to him, two shots were fired from the gun. After examining the blank catridges recovered, he has opined that the cartridges were fired from the muddamal gun. He has admitted in his cross examination that the barrel portion, the down portion of the bore and the but of the gun are flexible. On being specifically asked about the timings of the use of the gun, he has stated that the timings of the use of the gun cannot be ascertained.

6. Reading the above evidence of the Doctor as well as the Ballistic Expert, it is clear that the deceased died a homicidal death because of the fire arm injury. It is also clear that the shots were fired from the muddamal gun.

7. To bring home the charge against the appellant, the prosecution has placed reliance on the evidence of Lilaben, PW5-Exh.13 - complainant, Laxman, PW6 -Exh.14 uncle of the deceased, and Jashwant, PW8-Exh.18-brother of the deceased, who, according to the prosecution, are eye witnesses to the incident. PW5-Lilaben has given details about the incident by stating that the appellant came to her house in an agitated mood and told her that the Badva had disclosed him her name as well as the name of her son that they had stolen the Chhada and therefore, he demanded to return the Chhada by her. He has informed that he he would return with gun. Her sister, Rukhi and brother-in-law were there as guests, when the appellant came to her house and gave threat. It is further stated that her deceased son had gone to see off her sister and brother-in-law at Kevadia Patia and he returned at 5.00 p.m. Her other son Jashwant had also returned from school. The appellant came at about 6.00 p.m., fired a shot from his double barrel gun, and her son Parvat sustained injury and was profusely bleeding. He fell down at some distance from the house. According to her, she and her son had to sit behind the wall to save themselves. The appellant also aimed the gun at them and fired another shot. The Sarpanch Raghabhai had been informed and they all returned thereafter to her house and found deceased lying dead. Thereafter they had gone to Morwa Police Station for the purpose of lodging the complaint. The complainant in her cross examination also remained consistent with her earlier statement. Nothing

substantial is taken out in the cross examination which can help the defence. She had denied the suggestion that her son Parvat came out with Dharia. She has also denied the suggestion that her deceased son got excited when he was asked about the Chhada. She has stated that on the arrival of Sarpanch Raghabhai, he discussed about filing FIR. According to her, the Sarpanch had taken down the facts. She has stated that Saliya Police Chowk is at a distance of about 5 kms. from her house, however, she has denied the suggestion that no complaint was filed at Saliya Police Chowk as they were trying to settle the facts not to involve her sons in the offence. According to her, they reached Morwa Police Station at 10.00 p.m. The Sarpanch who had taken down the facts submitted to the Police Station and thereafter, the complaint was recorded by the PSI. She has admitted that she and the Sarpanch and the PSI have come in a police jeep at about 11.00 p.m. to the place of incident.

Laxman, PW6-Exh.14, though cited as an eye witness, has not supported the prosecution case and was declared hostile. Jashwant, PW8-Exh.18 has totally supported the complainant on all material aspects. Therefore, it is not necessary to reproduce their evidence.

Motibhai, PW3-Exh.11 - brother-in-law of the complainant in his evidence has also supported the complainant. He has clearly stated that on 20.12.1991, he and his wife had gone to the house of the complainant as guests. During their stay, the appellant had come there and picked up quarrel and demanded Chhada. According to this witness, the appellant had also given threat by stating that he will bring gun from Baria and thereafter he would kill the entire family. He has denied the suggestion that the deceased had taken out a Dharia from his house at about 2 p.m. when he was at the house. He has admitted that he and his wife left the house of the complainant at 1.30 p.m. or 2.00 p.m. in company of deceased upto to Kevadia Patia. He came to know about the incident on the next day.

Raghabhai Vanzara, PW10-Exh.22, Sarpanch of village Chanchelav has also supported the prosecution. According to him, on 20th December 1991, the complainant and her son Jashwant had come to his house and informed him that the appellant killed the complainant's son with gun. He has supported the complainant on all facts, namely, visiting the scene of offence, thereafter accompanying the complainant and her son to Morwa Police Station for filing the complaint. He was also called as

a panch of the scene of offence and also of the arrest panchnama. In his lengthy cross examination, he has remained consistent with his earlier statement. He has denied the suggestion, i.e. that he saw a Dharia lying near the house of the appellant and the same was removed from that place before the arrival of police. He has also denied the suggestion that he is helping the complainant as the son of the complainant Jashwant helped him in his election as a Sarpanch.

8. Reading the aforesaid evidence of the prosecution witnesses, there is no manner of doubt regarding the involvement of the appellant in commission of the crime. The appellant being a close relative of the complainant, the question of his false involvement in the offence does not arise. The appellant had strong suspicion that the complainant and her deceased son had stolen his Chhada. Therefore, he has given threat to the complainant to return the Chhada otherwise he would destroy them with the gun which he would bring from Baria. The incident of giving threat as well as shooting the deceased with the double barrel gun is duly established with the evidence of the prosecution witnesses. The evidence of procurement of the gun is also duly established with the evidence of Naginbhai Variya, PW11-Exh.24, Range Forest Officer, Baria. He has clearly stated in his evidence that the Government used to provide double barrel bridge bore guns with catridges to the Beat Guards. The Beat Guard has to deposit the gun as and when he proceeds on leave. The appellant was provided the gun having No. 90011008 on 8.7.1991. The appellant had not resumed duties since 14.12.1991 and has also not deposited the gun. The appellant was issued a notice dated 20th December 1991 to resume duties and to deposit the gun. He has produced the notice at Exh.25. He has also produced the letter at Exh.26 addressed to the PSI, Morwa Police Station regarding the gun in question allotted to the appellant. One more Forest Officer, namely, Pradipsinh, PW14-Exh.32 is also examined. In his evidence he has stated that he has produced the letter of allotment dated 8.7.1991 allotting gun No.S.V.90011008 to Shri A.A.Patel (appellant). Along with the gun, the appellant was also provided catridges, the belt of the gun, cover of the gun, oil koopy and live catridges 10 in number allotted on 7.9.1991.

9. From the aforesaid evidence of Forest Officers, it is further clear that the appellant was having a gun with live catridges on the day in question. The appellant, therefore, not only gave threat to the complainant and the sons but also completed the threat by

firing shots from the gun allotted to him. From the evidence on record, we are convinced beyond any manner of doubt that the appellant himself is responsible for committing murder of deceased Parvat. The trial Court, in our opinion, was justified in convicting the appellant for the offence punishable under Section 302 of IPC.

10. Mr.Shethna, learned Counsel appearing for the appellant after pointing out certain circumstances, submitted that the possibility of the appellant being provoked by the deceased cannot be ruled out. By inviting our attention to the suggestion as suggested in the cross examination of the prosecution witnesses, he submitted that the possibility of the deceased inflicting a dharia blow on the appellant and thereafter the appellant firing in his self-defence cannot be ruled out. In the submission of the learned Counsel, this being a case of self-defence, the appellant deserves a lesser sentence for any offence other than the offence under Section 302. Our attention has been invited to the cross examination of complainant Lilaben in para 5 wherein the complainant has denied the suggestion that the deceased came out with a Dharia from the house. She has also denied that she, her son Jashwant and deceased Parvat were breaking the tiles of the appellant's house. She has also denied the suggestion that they were persuaded not to do so by Dadamben and Laxmanbhai, however, they did not agree. She has also denied the suggestion that her son Parvat attacked the appellant with a Dharia and that her son Parvat was under influence of alcohol. Again she denied the suggestion that her son Parvat had inflicted Dharia blow on the gun and therefore, the gun was fired. She also denied the suggestion that after the firing, her son Parvat escaped from the compound of the appellant after throwing the Dharia there. Again she has denied that after the firing, the Sarpanch was called and thereafter at the instance of the Sarpanch, the Dharia was removed.

Our attention is also invited to the panchnama at Exh.21 of the recovery of the muddamal gun wherein the condition of the gun is mentioned. Perusing the same, it appears that the but portion of the gun bearing No.90011008 is broken and is separated from the gun. Learned Counsel for the appellant also invited our attention to the cross examination of Raisingbhai, PW15, PSI of Morwa Police Station wherein he has admitted that he has recorded the statements of Jitaben Somsinh, Lakhiben, and Savitaben (wife of appellant). According to him, Savitaben has stated in her statement that deceased had come out with a Dharia and was stating that

he had to kill a goat. He has also recorded the statement of the appellant wherein he has stated that the deceased was moving with weapon Vashi at the time of quarrel between him and the deceased. He has stated that the deceased ran after him after removing his shirt with weapon Vashi and with a view to save himself, he had come out with his gun and loaded two catridges and as the deceased ran towards him with Vashi, he fired the shot from the gun. Learned Counsel therefore, submitted with the aforesaid facts, namely, that the prosecution has not examined the wife of the appellant, though cited as a witness and in view of the deceased having run towards him with Vashi and has in fact attacked the appellant which resulted in the gun having broken are sufficient enough to exercise the right of self defence. We are not impressed with the submission of learned Counsel and the same is simply required to be rejected. The aforesaid suggestion though put to the prosecution witnesses, the appellant has not come out with such defence version in his further statement. All the prosecution witnesses have denied the suggestion in toto. Therefore, the suggestion remains merely a suggestion only. It does not take place of evidence. We just cannot ignore the specific evidence against the appellant. If at all the gun was broken because of the use of Dharia by the deceased, the appellant could have pleaded so by putting questions to the Investigating Officer or Ballistic Expert. Thus on the basis of Recovery Panchnama of gun wherein the condition of gun is mentioned, alone it cannot be concluded that deceased while giving blow with Dharia damaged the gun. As per the evidence of the Forest Officers, the muddamal gun had remained with the appellant as he has not deposited the gun back to the Department. Therefore, the possibility of breaking the but of the gun by him also cannot be ruled out, for creating evidence for making out a case of self defence.

11. Apart from that, surprisingly in the instant case, the learned Addl.Sessions Judge has permitted the defence lawyer to cross examine the investigating officer by referring to the police statements of certain persons who were not examined by the prosecution and also the statement of the appellant recorded by the police during investigation. This is totally illegal and erroneous. The police statements cannot be substituted as evidence and therefore, they are simply required to be rejected. We, therefore, refuse to see the police statement of the concerned witnesses, including the wife of appellant and the statement of appellant, made during investigation. On failure to examine those witnesses who have obliged

the defence, the defence could have very well examined them as defence witnesses. Surprisingly, in the purshis for dropping of witnesses produced by the Public Prosecutor, the defence has endorsed "no objection" to the same. In this view of the matter, it is now not open for the appellant to make any grievance of dropping of witnesses by the prosecution. We, therefore, see no merit in this submission of the learned Counsel for the appellant, and we therefore reject the same.

12. In the result, we confirm the judgment and order of conviction under Section 302 of IPC and sentence to suffer rigorous imprisonment for life and fine of Rs.500/- in default to undergo imprisonment for one year and also the conviction under Section 307 of IPC and the sentence imposed thereunder namely, rigorous imprisonment for five years. However, considering the facts and circumstances of the case, we direct both the sentences to run concurrently and not consecutively as directed by the learned trial Judge. The appeal is accordingly partly allowed to the aforesaid extent only.

(Kshitij R. Vyas, J.)

(Akshay H. Mehta, J.)

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